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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROLANDO BATRES, Defendant and Appellant.	B216580 (Los Angeles County Super. Ct. No. MA035540)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

In defendant Rolando Batres's first appeal, we affirmed his convictions on multiple felony counts stemming from years of sexually abusing his daughter. (*People v. Batres* (Sept. 22, 2008) B199173 [nonpub. opn.].) However, we agreed, and the People acknowledged, that defendant was correct the trial court erred in finding defendant's third degree arson conviction under New York law qualified as a strike under California law. Accordingly, we reversed the true finding as to that strike allegation, vacated the sentence, and remanded the matter for retrial on whether the arson conviction qualified as a strike under California law. As a result, we did not reach defendant's claim his 417-year sentence constituted cruel and/or unusual punishment.

On remand, the People elected not to retry the prior strike allegation, and the trial court resentenced defendant as a second-strike offender to an aggregate sentence of 207 years 8 months to life in state prison. On appeal, defendant contends imposition of the upper terms for forcible rape and forcible oral copulation based on factual determinations made by the trial judge violated his federal constitutional right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). He also contends his sentence of 207 years 8 months was cruel and/or unusual punishment under the Federal and State Constitutions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2007, a jury convicted defendant of three counts of aggravated sexual assault upon a child under the age of 14 years and more than 10 years his junior (Pen. Code, § 269)[1] (counts 1, 5 & 14), three counts of a lewd and lascivious act upon a child under the age of 14 years (§ 288) (counts 2, 3 & 4), one count of sexual penetration by foreign object upon a child under the age of 18 years (§ 289) (count 6), five counts of forcible rape (§ 261) (counts 7-11); and one count of oral copulation upon a child and one count of forcible oral copulation (§ 288a) (counts 12 & 13). In a bifurcated proceeding, the trial court found defendant had previously suffered one serious felony conviction

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[1] Statutory references are to the Penal Code.

(§ 667, subd. (a)) and two serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served three separate prison terms for felonies (§ 667.5, subd. (b)).

At defendant's original sentencing hearing on April 13, 2007, he was sentenced as a third-strike offender to an aggregate state prison term of 417 years. In imposing sentence, the court reviewed the facts of the case and in doing so, specifically mentioned several of the factors identified in the probation report, including: (1) the crimes involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness (see Cal. Rules of Court, rule 4.421(a)(1))[2]; (2) the victim was particularly vulnerable (rule 4.421(a)(3)); (3) the manner in which the crime was carried out indicated planning, sophistication or professionalism (rule 4.421(a)(8)); (4) defendant has engaged in violent conduct that indicates a serious danger to society (rule 4.421(b)(1)); defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness (rule 4.421(b)(2)); defendant has served prior prison terms (rule 4.421(b)(3)); and defendant's prior performance on probation or parole has been unsatisfactory (rule 4.421(b)(5)).

The trial court held a new sentencing hearing on May 13, 2009, and stated it was resentencing defendant based on the same aggravating factors it had previously relied upon in sentencing defendant. The court then sentenced defendant to an aggregate state prison term of 207 years 8 months to life, consisting of consecutive indeterminate terms of 30 years to life (the term of 15 years to life doubled under the Three Strikes law) on counts 1, 5 and 14 for aggravated sexual assault upon a child; plus consecutive determinate terms of 16 years (the upper term of eight years doubled) on counts 7 through 11 for forcible rape, and on count 16 for forcible oral copulation; plus four years (one-third the middle term of six years doubled) on counts 2, 3 and 4 for lewd act upon a child; plus one year four months (one-third the middle term of two years doubled) on

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[2] Rule references are to the California Rules of Court.

count 6 for sexual penetration by a foreign object and on count 12 for oral copulation; plus five years for the prior serious felony conviction, and two years for the prior prison term enhancements. Defendant timely appealed.

DISCUSSION

1. *Imposition of the Upper Term For Forcible Rape and Forcible Oral Copulation Did Not Violate Defendant's Federal Constitutional Right to a Jury Trial*

At the May 13, 2009 resentencing hearing, neither counsel addressed—and the trial court did not discuss—the consequences of *Cunningham,* or the impact of the Legislature's post-*Cunningham* amendment to the determinate sentencing law or the California Supreme Court's July 19, 2007 decision in *Sandoval*.

In *Cunningham, supra*, 549 U.S. 296, the United States Supreme Court held California's determinate sentencing law violates a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution to the extent it authorizes the trial judge to find facts (other than a prior conviction) by a preponderance of the evidence that subject a defendant to the possibility of an upper term sentence. Following *Cunningham* the Legislature amended section 1170, subdivision (b), effective March 30, 2007 as urgency legislation (Stats. 2007, ch. 3, § 3, p. 682), to eliminate the statutory presumption for the middle term and, instead, to grant the trial court full discretion to impose the upper, middle or lower term. (§ 1170, subd. (b) ["[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court"]; see *People v. Sandoval* (2007) 41 Cal.4th 825, 845.)

Noting that Senate Bill No. 40 (2007-2008 Reg. Sess.), which amended section 1170, subdivision (b), contains no language regarding retroactivity, the California Supreme Court in *Sandoval, supra*, 41 Cal.4th 825 avoided deciding whether the amendments to the determinative sentencing law applied to all sentencing proceedings conducted after the effective date of those amendments (see *id*. at p. 845) by "fashion[ing] a constitutional procedure for resentencing in cases in which *Cunningham*

requires a reversal of an upper term sentence." (*Id*. at p. 846.) The *Sandoval* Court held a defendant, not subject to the amended sentencing procedures, is nonetheless properly sentenced or resentenced under a judicially reformed sentencing scheme in which the trial court has full discretion to impose the upper, middle or lower term unconstrained by the requirement that the upper term may not be imposed unless an aggravating circumstances is established. (See *id.* at pp. 845-852; *People v. French* (2008) 43 Cal.4th 36, 45.) "Under [the Supreme Court's] holding in *Sandoval*, if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence." (*French,* at pp. 45-46.)

In short, by the time defendant was sentenced as a second-strike offender on May 13, 2009 for his February 2007 conviction, the trial court was authorized to proceed pursuant to—and defendant's constitutional rights were fully protected by—either amended section 1170, subdivision (b), or the reformed sentencing scheme described in *Sandoval*. Under either version of the governing sentencing law, it was constitutionally permissible for the trial court to impose the upper term for the forcible rape and forcible oral copulation convictions without any additional jury findings. (See, e.g., *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

2. *Defendant's Sentence of 207 years 8 Months Does Not Violate the Federal or State Constitutions' Prohibitions Against Cruel and/or Unusual Punishment*

Defendant contends his sentence of 207 years 8 months in prison because it exceeds his life expectancy, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and cruel or unusual punishment in violation of the California Constitution. Defendant has forfeited these arguments by failing to raise them in the trial court. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) In addition, they fail on their merits.

Federal courts have consistently rejected claims that life sentences (or, in this case, the possible functional equivalent) imposed on recidivists like defendant violate the ban on cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution. (*Ewing v. California* (2003) 538 U.S. 11, 29 [123 S.Ct. 1179; 155 L.Ed.2d 108] ["In weighing the gravity of [defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions."]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [123 S.Ct. 1166, 155 L.Ed.2d 144]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965 [111 S.Ct. 2680, 115 L.Ed.2d 836]; *Rummel v. Estelle* (1980) 445 U.S. 263, 284 [100 S.Ct. 1133, 63 L.Ed.2d 382].) Neither defendant's prior criminal history (including a 1989 conviction for infliction of corporal injury on a child, a 2000 conviction for making a criminal threat, a 2003 conviction for possession of a firearm as a felon, and several driving under the influence convictions) nor the nature of his current offenses warrants a different conclusion in this case.

California appellate courts likewise have consistently rejected claims that sentences imposed under recidivist statutes violate the prohibition against cruel or unusual punishment contained in the California Constitution. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 820, 826-827; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) Under state law defendant must overcome a "considerable burden" in challenging her penalty as cruel or unusual (*People v. Wingo* (1975) 14 Cal.3d 169, 174), demonstrating that the punishment is so disproportionate to the crime for which it was imposed it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In assessing these claims the *Lynch* Court identified three factors for reviewing courts to consider: (1) the nature of the offense and/or the offender; (2) how the punishment compares with punishments for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Id*. at pp. 425-427.)

The first prong of the *Lynch* test does not support a finding of disproportionality. The qualifying strike conviction used to enhance his sentence under the Three Strikes law and section 667, subdivision (a) was making a criminal threat, a crime of violence. As the trial court observed, "the facts of the case were horrendous." According to the trial evidence, defendant began sexually abusing his daughter when she was four years old, and he threatened to harm her or her grandparents if she reported the touching to anyone. Over the years, defendant escalated the nature and degree of his sexual abuse to repeated rapes, which eventually caused his daughter to become pregnant at 17 years old. After giving birth to a baby boy in 2005, the daughter was still subjected to sexual abuse by defendant until 2006, when she told her mother and contacted police. As the trial court noted, defendant, who represented himself during trial, expressed no remorse for his conduct, instead claiming he had done nothing wrong. When the nature of the offense and the offender are considered, defendant's sentence is neither shocking nor inhumane. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 479, 482-488 [determinations whether a punishment is cruel or unusual may be based solely on the nature of the offense and the offender]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Defendant fails to offer any argument as to the second or third *Lynch* factors other than to note his sentence of 207 years 8 months amounts to a life sentence. As we have explained, defendant is being punished for both his current offenses and his prior criminal behavior under a California statutory scheme that expressly mandates more severe punishment for habitual criminals. Statutory schemes providing for increased punishment for recidivists have long withstood challenges on the ground they constitute cruel or unusual punishment. (*People v. Cooper, supra,* 43 Cal.App.4th at pp. 826-827; *People v. Kinsey, supra,* 40 Cal.App.4th at pp. 1630-1631.) This case is not the "exquisite rarity" where the sentence is so harsh as to shock the conscience or offend fundamental notions of human dignity. (See *Kinsey,* at p. 1631.) Accordingly, there is no basis to find the sentence unconstitutional under either the United States or California Constitution. (*Lockyer v. Andrade, supra,* 538 U.S. at p. 77; *Cooper, supra,* 43 Cal.App.4th at pp. 826-827.)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.